UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BERGER, Plaintiff,	:	**Docket#** 17-CV-06728-JFB-ARL
- versus -	:	U.S. Courthouse Central Islip, New York
MFI HOLDING CORPORATION, et al., Defendants	:	March 28, 2019 10:36 AM

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: **Spencer Sheehan, Esq.**
Sheehan & Associates, P.C.
505 Northern Boulevard
Suite 311
Great Neck, NY 11021

For the Defendant: **August T. Horvath, Esq.**
Foley Hoag LLP
1301 Avenue of the Americas
New York, NY 10019

Transcription Service: **Transcriptions Plus II, Inc.**
61 Beatrice Avenue
West Islip, New York 11795
laferrara44@gmail.com

Proceedings recorded by electronic sound-recording, transcript produced by transcription service

THE CLERK: Calling case 17-CV-6728, Berger v. MFI Holding Corporation.

Please state your appearance for the record.

MR. SHEEHAN: For the plaintiff, Spencer Sheehan, Sheehan & Associates, P.C., 505 Northern Boulevard, Suite 311, Great Neck, New York 11021.

MR. HORVATH: For defendants, August Horvath from the firm of Foley Hoag, 1301 Sixth Avenue, New York City.

THE COURT: All right. Good afternoon, counsel.

As you know, I scheduled this because I wanted to place a ruling on the record with respect to the pending motion to dismiss and I apologize for having to reschedule for today but I decided given how long the motion has been pending to, rather than utilize decision, just place a detailed oral ruling on the record. If you want to order a copy of the transcript of this ruling, you can do so through the clerk's office, and obviously if there are any questions about the ruling, I will answer them when I am done. It should take about 15 minutes or so to place it on the record.

So for reasons I am going to state in detail in a moment, I am granting in part and denying in part, the motion to dismiss. Specifically, I am granting the

motion with respect to the implied warranty of merchantability claim and the unjust enrichment claim. I'm denying the motion with respect to the New York General Business Law Sections 349 and 50, the express warranty claim and the common law fraud claim. I'm also denying the request to strike placing plaintiffs' nationwide class allegations as to the remaining claims and I separately conclude that the plaintiff does not have standing to seek injunctive relief in this particular case.

With respect to the standard the Court is applying, obviously it's well-settled and incorporated by reference rather than repeating it in any great detail, I incorporate from my prior written opinions including Schiff v. Stevens, 2017 WL 65432 (E.D.N.Y. January 6th, 2017) and Litras v. PVM International Corporation, 2013 WL 4118482 (E.D.N.Y. August 15, 2013).

Obviously, the Court is accepting the factual allegations in the complaint as true, drawing all reasonable inferences in the plaintiff's favor and then determining whether a plausible claim exists under the Iqbal-Twombly standard.

The Court's obviously -- excuse me -- the parties are familiar with the facts of the case. I am just going to briefly describe some of the relevant

background allegations from the first amended complaint, which again the Court is assuming to be true for purposes of deciding the motion.

It's alleged that defendant Michael Foods, Inc. manufactures and sells refrigerated mashed potatoes products, branded as Simply Potatoes in retail outlets and online. That's paragraphs 1 and 3.

The packaging to which plaintiff objects contains phrases, among others, "made with real butter and milk". That's paragraph 5. And variants of the claim that the product is "made with fresh potatoes". That's paragraphs 6, 7, and 8.

According to the ingredient list, defendants' product contains both butter and margarine. That's paragraph 20. Margarine is listed twice on the packaging, once in bold. The parties agree that the potatoes used to make the Simply Potatoes products are fresh as defined by FDA regulations, in that they are in a raw state and have been frozen or subject -- have not been frozen or subjected to any form of thermal processing or any other form of preservation. That's 21 USC Section 101.95.

The complaint alleges that there are varying claims on the packaging, including the words "simply", "simple", and "simplest".

It further alleges that the products are sold for between $2.99 and $5.99 per unit, which the plaintiff alleges to be a premium price, compared to other refrigerated mashed potato products. That's paragraph 61.

The complaint alleges in paragraphs 104 and 105, that plaintiff believed the refrigerated mashed potatoes product were fresh as in just prepared or prepared within a time period which have not required the use of chemical preservatives to extend their shelf life up to three months. And specifically references the labeling including the made from fresh potatoes, supporting why he reached that conclusion.

He alleges in paragraph 82, that he purchased the simply potatoes product from a retail outlet in the second half of 2017, for no less than $3.99 which he alleges to be a premium he paid, in reliance on the characteristics of the product, as he understood them from the context of the defendants' packaging.

The defendants move to dismiss the case for failure to state a claim in the alternative to strike plaintiff's nationwide class allegations. The defendants addressed each of the six claims in turn, arguing that the case first should be dismissed on the grounds that the plaintiff's claims are expressly preempted by federal

labeling regulations promulgated by the Food and Drug Administration and then arguing as to other grounds for dismissal under 12(b)(6) in addition to preemption. Defendant also argues that the plaintiff lacks standing for injunctive relief.

First addressing the preemption issue, the defendant argues that the plaintiffs claims with regard to the statements "made with real butter", and relating to the use of the word "fresh", are preempted because regulations promulgated by the FDA affirmatively permit the use of these statements in labeling, thereby preempting any state law claim which would prohibit their use.

Under Supreme Court jurisprudence, federal preemption of state law should be evaluated by looking first to the purpose of congress in creating the federal law at issue, and second, in cases in which congress has legislated in a field which the states had traditionally occupied, a presumption against preemption should govern without the clear and manifest purpose of congress to disrupt it. That's Wyeth v. Levine, 55 US -- 555 US 555, at page 565 (2009).

Because of its relationship to public health and safety, Food and Drug regulation has been held to be such a field; Ackerman v. Coca-Cola Co. (2010) 2925955 at

page 6, (E.D.N.Y. 2010), collecting other cases.

Further, where congress has provided an express preemption provision in the statute, the presumption against preemption requires courts to read the clause narrowly. That's from the Ackerman case, as well.

Here, congress has provided an express preemption provision at 21 USC Section 343-1(a)(5) and the preemption of state law with regard to nutrient content claims as defined in 21 USC Section 343(r)(1), is well established.

However, where the disputed label components do not qualify as such, it is not clear that the presumption against preemption should be disturbed and I am applying that to this situation, especially when you combine the allegations regarding the context of all of the labeling together, I don't believe that preemption should apply to this case -- the parties -- based upon the allegations.

The parties agree that made with real butter appears as an example of a claim which is generally, and I emphasize the word generally, not an implied nutrient content claim. 21 CFR Section (b)(3). And that fresh is used by defendant in a way that complies with the requirements set forth in 21 CFR Section 101.95.

First, that fact with neither made with real butter nor fresh, is a nutrient content claim, appears to

be -- remove them from the scope of the preemption provision at 21 USC Section 343-1(a)(5).

Other courts have also found that claims against similar non-nutrient content statements are not preempted by the NLEA, including Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc., 2017 WL 4224723 (N.D.Cal. September 22, 2017), finding that claims addressing "made with real ginger" were not preempted, as well as Red v. Kraft Foods Inc. 754 F.Supp 2d 1137, 1143 (C.D. CA 2010), finding that claims addressing "made with real ginger and molasses" and "made with real vegetables" were not preempted.

The defendants also, the second contention that because of the use of each of these terms expressly permitted by the regulations, plaintiff's state law claims are thereby preempted, I think again, overlooks the fact that these -- part of the allegations are that these phrases are being used in combination to create a false and misleading impression to the consumer. Although made with real butter is listed in the regulations as an example, and the defendant can use fresh in compliance with the relevant regulations, each claim must nonetheless in its totality, comply with the requirements of 21 USC Section 343(a) which deems food misbranded, if its labeling is false or misleading in any

particular.

Here in paragraph -- including in paragraphs 58 through 60, the plaintiff is alleging that the made with real butter and milk claim, complemented by the surrounding representations including Simply Potatoes, simple, fresh, and one of nature's simplest foods, in combination are creating a false and misleading representation to the consumers. So I don't believe that the case should be dismissed at this juncture, based upon preemption.

With respect to the particular claims, I find plausible claims have been stated. New York General Business Law Sections 349 and 350, I will address first. The defendant seeks to dismiss those claims which prohibit deceptive acts or practices which prohibit deceptive acts or practices in the conduct of any business trade or commerce or in the furnishing of any services; that's 349. As well as false advertising in the conduct of any business trade or commerce, or in the furnishing of any services, that's 350.

I've outlined the elements in a case called Kilgor v. Ocwen Loan Servicing, LLC, 89 F.Supp 3d 526 at 535 and 36 (EDNY 2015). For 349, plaintiff must demonstrate:

One, the defendants' deceptive acts were

directed at consumers.

Two, the acts are misleading in a material way; and

Three, the plaintiff has been injured as a result.

With regard to the material misleading element, "The New York Court of Appeals has adopted and objective definition of 'misleading' under which the alleged act 'must be likely to mislead a reasonable consumer acting reasonably under the circumstances.'" That's a Second Circuit quote from Orlander v. Staples, Inc. 802 F.3d 289 at 300 (2d. Cir. 2015).

The standard for recovery under Section 350, while specific to false advertising is otherwise identical in terms of the elements to Section 349. Himber v. Intuit, Inc., 2012 WL 4442796 at page 9. That's decision I issued in September 25th of 2012, quoting other cases.

I find that plaintiff has plausibly alleged a claim as relates to the elements for both 349 and 350. The defendant argues that no reasonable consumer would imply the absence of margarine into a claim that the product is made with real butter, rejecting plaintiff's allegation that margin is historically and in the mind of the common consumer, a less desirable, artificial

alternative to butter.

Similarly, the defendant argues that the use of the word fresh to describe the potatoes from which Simply Potatoes is made, would not lead the reasonable consumer to believe that the product as a whole is fresh, where fresh means just prepared rather than shelf stable.

Although obviously these arguments can all be made again at the summary judgment stage, I don't believe that they undermine the plausibility of plaintiff's claim with respect to 349 and 350. Plaintiff has plausibly alleged the defendants' product packaging is directed at consumers at large and that through the payment of the premium, and in reliance on the defendants' packaging, suffered an economic injury.

With regard to the material misleading element, the plaintiff has plausibly alleged that a reasonable consumer could be misled by the claim made with real butter and milk on a product containing margarine, like the other words on the packaging, including terms like simply, simple and simplest. And plaintiff further plausibly alleged that one of the other claims on the packaging, a reasonable consumer might be misled about the word fresh as it relates to the product.

Accordingly, I am denying the motion to dismiss those claims.

I would just note, and plaintiff did supply the citation. I had seen it independently of plaintiff providing it to the Court. The Second Circuit, while this motion was pending, did issue a decision in a case called Mantikas, M-A-N-T-I-K-A-S, v. Kellogg Company, 910 F.3d 633 (2d.Cir 2018) and obviously the facts of each case are different. I believe this provides overall guidance to district courts that when it's plausibly alleged that a consumer could be misled with respect to this type of labeling, the courts should not on a motion to dismiss, conclude otherwise.

In the decision, the Court noted on page 638, where the defendant had contended, citing a number of district court decisions that had dismissed these types of claims at the motion to dismiss stage, that as a matter of law, it's not misleading to state that a product is made with a specific ingredient, if that ingredient is, in fact, present.

The Second Circuit rejected that and noted that rationale would validate highly deceptive advertising and labeling. It goes onto discuss the Iqbal-Twombly standard and it is clear to be based upon that decision, the Second Circuit believes that the type of pleading that we have here in this case is sufficient to plausibly allege that type of false or misleading is advertising or

statement to the consumer, to a reasonable consumer and that these are more properly addressed at a summary judgment stage.

With respect to the fraud claim, the Court reaches the same conclusion that it should not be dismissed. The standard for fraud claim is contained in an opinion I wrote, McAnaney v. Astoria Financial Corp., 665 F.Supp 2d, 132 at 176 (EDNY 2009). The elements are:

A false representation of material fact.

Second, knowledge by the party who made the representation that it was false when made; and

Justifiable reliance by the plaintiff; and

Four, damages.

I believe these have been plausibly alleged in the complaint. The defendant argues specifically that plaintiff has failed to plead his fraud claim addressing the packaging statements that Simply Potatoes are made with or made from fresh potatoes with sufficient specificity, particularly with regard to fraudulent intent.

The Court believes that the pleading is sufficient in that regard and with regard to each of the elements, the plaintiff plausibly alleges a false representation of material fact on the theory, among other things, that a reasonable consumer might be misled

about the product based on the use of fresh on the packaging, in combination with the other terms.

With respect to the scienter element, the plaintiff specifically pled that a 2014 digital brochure created by defendants for food service and restaurant industry distribution contains survey results indicating that 83 percent of consumers believed that refrigerated potatoes are fresh, that's paragraphs 41 and 42, plausibly alleging that that the defendant knew a reasonable consumer might be misled by the use of the term fresh in the context of refrigerated potatoes. So I don't believe at this stage that the fraud claim should be dismissed.

Moving to unjust enrichment, I do dismiss the unjust enrichment claim as I noted in Wurtz v. Rawlings Company, LLC, 2014 WL 4961422 (E.D.N.Y. October 3rd, 2014), citing Second Circuit law. In order to prove a claim under New York Law, plaintiff must demonstrate:

(1) that the defendant benefitted,

(2) at the plaintiff's expense; and

(3) that equity and good conscience require restitution.

That's Beth Israel Medical Center v. Horizon Blue Cross and Blue Shield of N.J., Inc. 448 F.3d 573, 586 (2d Cir. 2006).

However, it's also clear under New York Law that unjust enrichment, and I am now quoting from a case I will cite in a moment, "Is not available where it simply duplicates or replaces a conventional contract or tort claim." Weisblum v. Prophase Labs, Inc., 88 F. Supp. 3d 283 (SDNY 2015).

Applying this settled principle under New York Law, another judge in this court recently dismissed, recently being last year, an unjust enrichment claim where it was duplicative of a 349 and 350 false advertising and fraudulent misrepresentation claims. That's Davis v. Hain -- the Hain Celestial Group, Inc., 2018 U.S.Dist. Lexis 56794 (EDNY April 3, 2018).

I reached a similar conclusion here that because the plaintiff's unjust enrichment claim is entirely duplicative and based upon the same alleged misrepresentations that are made in the other claims, that it is duplicative of the other claims and therefore, is dismissed under New York Law.

With respect to the breach of an express warranty and implied warranty of merchantability, with respect to the express warranty claims, I set forth the standard in Hollman v. Taser International, Inc., 928 F.Supp 2d 567 at page 681 (EDNY 2013). I incorporate that standard here.

Defendant argues that the plaintiff fails to plausibly allege an express warranty claim because he fails to plead the existence of the express warranty in question. Namely, defendant contests the notion that the claim made with real butter and milk can be read as an affirmation regarding the presence or absence of margin, while plaintiff alleges that it expressly warrants the absence of margarine in the product. That's paragraph 92.

Again, at a motion to dismiss stage, I think the plaintiff has plausibly alleged that a reasonable consumer could be misled by the claim and defendant has failed to cite any New York case law addressing the implied absence argument in the context of an express warranty claim. So I think it would be premature to dismiss the express warranty claim at this juncture.

I do grant the motion as it relates to the implied warranty of merchantability claim. The applied warranty of merchantability claim is governed by New York Uniformed Commercial Code Section 2-314(1).

I don't need to reach the plausibility of the plaintiff's claim because as I agree with Judge Furman's analysis in Weisblum v. Prophase Labs, Inc., 88 F.Supp. 3d 283 (SDNY 2015), that the law -- it's at page 296, the law is clear that absent any privy of contract between

plaintiff and defendant, such a claim cannot be sustained as a matter of law, except to recover for personal injuries. Other cases have reached the same conclusion that Judge Furman cites, including Freidman v. General Motors Corp., 2009 WL 454252, page 2, (S.D.N.Y. February 23, 2009).

Here, plaintiff has failed to allege any privity of contract between the plaintiff and the defendant, as plaintiff purchased the product at a retail store and because there's obviously no personal injury alleged here as a result of the defendant's conduct, I conclude that the breach of implied warranty of merchantability should be dismissed.

Defendant -- moving to the class allegations, plaintiff moves to strike the nationwide class allegations, arguing that the majority of the putative class members would not have standing under Section 349 and 350 and that because the common law claims of hypothetical, non-New York residents, must lie in established standing under the common law of their respective states. The absence of non-New York plaintiffs in this case should be fatal to the class allegations.

I note generally that motions to strike are generally looked upon with disfavor. Chenensky v. New

York Life Insurance Co., (SDNY April 27, 2011). And I conclude in this case, that there is no basis to strike the allegations as been noted in the case called Ironforge.com v. Paychex Inc., 747 F.Supp 2d 384, 404, (W.D.N.Y. 2010). A motion to strike class allegations under Rule 12(f) is even more disfavored because it requires a reviewing court to preemptively terminate the class aspects of litigation, solely on the basis of what is alleged in the complaint and before plaintiffs are permitted to complete the discovery to which they would otherwise would be entitled to on the questions relevant to the class certification.

The Court reaches the same conclusion here, and I understand, obviously although a motion to strike that addresses issues separate and apart from the issues that will be decided on a class certification motion is not procedurally premature. I conclude that that is not the case here.

I also note with respect to the second argument regarding common law claims of non-New York residents, and the need to establish standing in their respective states, I think there has been case law that has addressed that argument recently, suggesting otherwise.

But in any event, I think it's premature to strike the class allegations at this stage of the

litigation.

With respect to the injunctive relief, the defendant is correct that there is no basis for injunctive relief here. I set forth the standard -- the standing -- standard for standing in a recent opinion, Preserve at Connetquot Homeowners Assoc., Inc. v. Costco Wholesale Corp., 2019 WL 337093 (E.D.N.Y. January 28, 2019) at page 5. In the context of a prospective injunctive relief, the Supreme Court and the Second Circuit concluded that a plaintiff lacks standing to pursue injunctive relief, if the plaintiff does not establish a real or immediate threat of injury, rather than allegations of future harm that are merely speculative.

I noted in that opinion that although past injuries may provide a basis for standing to seek money damages, they do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again the future in a similar way.

Here the harm that plaintiff alleges is the purchase of Simply Potatoes product at a premium in reliance on defendant's alleged misrepresentations on the package because he believed it to be fresh, as in just prepared and to contain only butter and not margarine because plaintiff now knows that the product is shelf

stable, can be on the shelf for months and contains margarine. He cannot purchase the product in reliance on those characteristics again and therefore cannot demonstrate that he's likely to be harmed in the future in a similar way. He hasn't allegedly any other present harm that might recur nor any continuing harm and therefore, he lacks standing for injunctive relief.

To the extent he is trying to assert some type of third-party standing for other consumers, because I think that was mentioned in the opposition, I agree with other courts that have concluded that a plaintiff does not have the ability to try to allege standing on behalf of others. That's Greene v. Gerber Products Co., 262 F. Supp 3d 38, at page 56 (EDNY 2017).

So in conclusion, the Court believes that there are plausible claims stated under New York law with regard to the Section 349 and 350, express warranty and common law fraud claims that are not preempted at this point but not with regard to the implied warranty of merchantability or unjust enrichment claims.

And the motion to strike the nationwide class allegations is denied but I do find that there is no standing for injunctive relief.

All right. Are there any questions regarding the Court's ruling from the plaintiff's counsel?

MR. SHEEHAN: No, your Honor.

THE COURT: Defendant's counsel?

MR. HORVATH: No, your Honor.

THE COURT: All right. Then I assume you're under the supervision of the magistrate judge on discovery. Correct?

MR. SHEEHAN: We haven't been --

MR. HORVATH: That was (indiscernible).

MR. SHEEHAN: -- (indiscernible) discovery but we will be, yes. Yes, your Honor.

THE COURT: I'm sorry, say that again.

MR. SHEEHAN: Oh, I said, your Honor, that yes, we are under the supervision of the magistrate, although as defendants' counsel accurate noted, discovery has not been commenced at this point.

THE COURT: Right. Is there a conference date scheduled? That's why, obviously, I did the oral ruling. I didn't want to hold up the case further but has there been a conference even scheduled or no?

MR. HORVATH: No, your Honor.

THE COURT: Okay. So --

MR. SHEEHAN: I don't believe so, your Honor.

THE COURT: We'll notify -- there will be a short order that will issue, just memorializing the ruling and we'll also contact the magistrate judge's

chambers just to make sure they knows that -- Judge Lindsay, that they should initiate the discovery process.

You might want to discuss among yourselves that process. I think Judge Lindsay often will cancel an in-person appearance if there's agreement just let you submit a schedule. So you might want to try to work that out. All right?

MR. SHEEHAN: Thank you.

THE COURT: All right. Thank you. Have a good day.

MR. HORVATH: Your Honor, just --

THE COURT: Yes.

MR. HORVATH: Your Honor, just to clarify in terms of obtaining a copy of your opinion, you stated that there will be no written opinion and we should obtain a transcript.

THE COURT: Yes.

MR. HORVATH: Okay, just wanted to be clear. Thank you.

THE COURT: Yeah, you can -- if you call the clerk's office, there will be an FTR number on the docket sheet that will be the identifier for purposes of the recording. If you contact the clerk's office, give them those numbers. They'll send it out to a company for transcription, okay?

MR. HORVATH: Yes. Thanks, your Honor.

THE COURT: All right. Have a good day.

MR. HORVATH: Thank you.

MR. SHEEHAN: Okay, bye.

MR. HORVATH: Thank you. You, too.

(Matter concluded)

-o0o-

C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **2nd** day of **April**, 2019.

Linda Ferrara

Linda Ferrara

AAERT CET 656
Transcriptions Plus II, Inc.